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October 23, 2002

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: WC Docket No. 02-214, *Application by Verizon Virginia Inc., Verizon Long Distance Virginia Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization To Provide In-Region, InterLATA Services in Virginia*

Dear Ms. Dortch:

Verizon's October 16 ex parte letter concerning the justness and reasonableness of its recently filed switching rates in Virginia leaves the two central facts essentially unchallenged. First, Verizon's switching prices cannot survive direct scrutiny of their TELRIC compliance because they violate basic TELRIC principles. Second, the aggregate benchmark comparison that Verizon relies on to exclude any direct scrutiny of the TELRIC compliance of its switching rates is invalid. It relies on cost data from the Synthesis Model, which does not produce valid Virginia-to-New York comparisons of the costs of any bundle of elements that includes transport. The welter of arguments and assertions in Verizon's 25-page ex parte filing do not begin to overcome these facts.[1] This is a case where an intervenor has "tendere[ed] evidence of benchmark unreasonableness so strong as to preclude FCC approval without a hearing" into the underlying TELRIC compliance of the Virginia rates themselves. *WorldCom, Inc. v. FCC*, No. 01-1198 (D.C. Cir., Oct. 22, 2002), slip op. at 7.

[1] This letter does not discuss the switch-only benchmark comparisons with non-Verizon states that Verizon submitted for the first time in a separate ex parte yesterday evening. AT&T will respond to that filing later this week.

A. Verizon's Ex Parte Offers No Response to the Critical Evidence That The Switching Rates Violate TELRIC.

Verizon does not even mention, let alone challenge, the analysis offered in AT&T's October 9 Supplemental Comments demonstrating that Verizon's prices for unbundled switching in Virginia are still unjust and unreasonable. AT&T's Supplemental Comments (including the accompanying declaration of Michael R. Baranowski) demonstrated that:

- Verizon's recently filed switching rates still produce a significant overrecovery of Verizon's costs. AT&T Supp. Comments at 3-4; Baranowski Supp. Decl. ¶¶ 11-15.

- Verizon's defense of the most significant and fundamental costing error committed by the Virginia State Corporation Commission—its arbitrary and unexplained decision to assume that an efficient competitor would purchase a 54/46 mix of replacement and growth equipment for switching—is a post hoc rationalization of counsel that cannot be relied upon by the Commission as a basis for uphold the SCC's action as reasonable. AT&T Supp. Comments at 4-6.

- The spreadsheet analysis offered by Verizon in support of the 54/46 discount split, if modified to correct for a crude computational error and make its demand assumptions consistent with Verizon's current growth projections, *confirms* that Verizon's reduced switching rates are still grossly excessive, and that massive additional rate reductions would be needed to bring the rates into compliance with TELRIC. *Id*. at 6-7.

- Because Verizon's rates violate TELRIC today, it is irrelevant whether they were TELRIC when originally set by the Virginia SCC in 1998. The only costs that have legal and economic relevance are the forward-looking costs of today. Moreover, the intervening changes in costs are too large to be disregarded as *de minimis*. *Id*. at 8-9.

- Verizon's professed true-up commitments are no substitute for having TELRIC compliant rates today. Until potential competitors know with certainty the prices they ultimately must pay for UNEs used today, the barrier to entry created by Verizon's inflated UNE prices will remain. *Id*. at 10.

In response to this showing, Verizon has retreated to the proposition that the TELRIC compliance of its switching prices is "irrelevant" because Verizon's "non-loop rates" in Virginia benchmark in the aggregate with their counterparts in New York. Verizon ex parte letter at 22. As we show in the next section, however, the benchmark analysis is equally indefensible.

B. The Synthesis Model Does Not Produce Valid Comparisons Of The Relative Costs In New York And Virginia Of Bundles Of Elements That Include Transport.

Verizon offers no serious challenge to AT&T's previous showing that the Synthesis Model overstates transport costs, and tends to overstates them most in the states with the lowest line density. *Compare* Verizon ex parte at 15-17; AT&T Supp. Comments (Oct. 9, 2002) at 13-19.

Verizon's complaint that AT&T has failed to produce workpapers for the exhibits attached to AT&T's October 9 supplemental comments (*id*. at 16) merits no weight. Verizon never asked for the work papers; and both Verizon and the Commission are readily capable of replicating AT&T's density values and the ratios of SynMod costs to UNE transport rates by using publicly available data submitted to the FCC in its USF proceedings. The Commission can readily confirm this fact from the spreadsheets in Attachment 1, *infra*.[2]

Verizon's speculation that the line density of its service territory in Virginia may differ from the line density of the state as a whole (*id*.) is also unfounded. The data used by AT&T to calculate line density were supplied by Verizon itself, in response to a request for information limited to Verizon's service area.

Verizon brushes off the dispersion data submitted by AT&T (AT&T Supp. Comments at 13-14 & Exh. 2) on the ground that the data points do not correlate perfectly with a downward sloping linear function. Verizon would make the perfect the enemy of the good. Giving the variations among the costing approaches taken by each state commission in setting UNE prices (the values used by AT&T in this analysis as rough proxies for Verizon's TELRIC costs), the tightness of fit produced by the data (apparent with a curvilinear function)—is striking. More fundamentally, Verizon's quibbles over the precise tightness of fit, and the positions of a few data points, is hardly a refutation of the relationship that is obvious even from simply eyeballing the exhibit: as line density decreases, the overstatement of transport costs by the Synthesis Model clearly explodes.

Verizon's further objection that AT&T has failed to show that "there is a *causal* relationship between . . . the degree by which the Synthesis Model . . . overstates transport costs" and the line density of the state (Verizon ex parte at 15-17) ignores AT&T's previous filings, which showed just that. *See* New Hampshire/Delaware 271 case, AT&T reply declaration of Lieberman & Pitkin ¶¶ 15-16. As Messrs. Lieberman and Pitkin explained, the apparent causes of the cost overstatement include (1) an

[2] The per-line figures in Attachment 1 all draw upon the usage data from the Commission's Synthesis Model.

improper sizing of fiber optic rings by the model; (2) a failure to recognize the efficiencies that can be achieved when carriers work together to provide interoffice transport; and (3) the smaller economies of scale in rural areas endow these errors with a larger impact in rural areas, where the costs are spread over a smaller number of lines.

The best answer to Verizon's methodological quibbles, however, is supplied by Verizon itself. In the UNE pricing arbitration that is pending before the Commission, Verizon asks the Commission to adopt transport cost estimates that are only *one-third the level of the values generated by the Synthesis Model.* Verizon knows perfectly well that the Synthesis Model cost estimates are too high.

Verizon's assertion that the tendency of the Synthesis Model to overstate relative transport costs in lower density states is cancelled out by other errors in the opposite direction (October 16 ex parte at 17-18) is sheer speculation. Verizon has failed to identify any such countervailing error in the relevant range of line densities between New York and Virginia, let alone offer any data indicating that such errors precisely offset the overstatement of transport costs by the Synthesis Model. Given Verizon's incentives in the Virginia UNE litigation currently pending before the Commission, it is reasonable to presume that, if any such errors existed in the Synthesis Model, Verizon would have alerted the Commission to them. Hence, Verizon's silence warrants the inference that no significant offsetting errors exist in the underlying model.

Verizon's attribution to the Rural Task Force of the view that the Synthesis Model "'significantly underestimate[s] central office . . . switching investment' for carriers serving rural areas" (Verizon ex parte at 17-18) is a cynical distortion of the record. Verizon quotes the Rural Task Force report for the proposition that "'t]he Synthesis Model significantly underestimate[s] central office Switching investment' for carriers serving rural areas" and also underestimates "Network Operations and Customer Operations expenses." *Id*. at 17-18 (quoting portions of Task Force and Joint Board findings). The *actual* findings of the Task Force, however, concerned "rural carriers," not "carriers serving rural areas":

> The Synthesis Model significantly understated central office equipment (COE) Switching investment. This was likely due to the lack of economies of scale of the Rural Carriers, and the general tendency of the model to underestimate lines served.[3]

The distinction between "rural carriers" and "carriers serving rural areas" is crucial. The term "rural carrier" refers to a statutorily-defined class of local telephone

[3] *See* CC Docket No. 96-45, *Federal-State Joint Board on Universal Service*, Rural Task Force Recommendation to the Federal-State Joint Board (released Sept. 29, 2000) at 18 (4th bullet).

carriers that are relatively small and whose customers are primarily rural.[4] Because of their small overall scale, statutory "rural carriers" obviously tend to have higher switching costs than does Verizon, even in its rural service areas. Verizon, by contrast, purchases switching equipment from vendors on a consolidated, companywide basis, the discounted purchase price of a given piece of Verizon-owned switching equipment should be the same in rural areas as in Verizon's more urban wire centers: both should reflect the bargaining leverage generated by Verizon's enormous scale.[5]

Likewise, the "general tendency" of the TNS algorithm used by the Synthesis Model to "underestimate lines" for rural carriers in the absence of actual ARMIS line count data[6] is also a non-issue for Verizon. Unlike statutory "rural carriers," Verizon reports its actual ARMIS line count data for its entire local service territory, including its rural portions. The Synthesis Model runs used by AT&T for its New Hampshire benchmarking analysis were based on those ARMIS data.

For these and similar reasons, the Commission and the Rural Task Force have repeatedly emphasized that the recommendations of the Task Force apply "only to rural, insular, and high-cost areas *served by rural carriers*, and not to areas served by non-rural carriers."[7] Under the circumstances, Verizon's continued reliance on the Rural Task Force report for the proposition that, by the "same logic, the Model's inputs are likely to understate costs even for non-rural carriers to the extent that they are serving more rural areas" (Verizon *ex parte* at 18) can only be regarded as a deliberate attempt to mislead.[8]

In any event, Verizon's hypothesis that the Synthesis Model provides inaccurate estimates of switching or other non-transport costs, if correct, would provide an additional argument *against* using the model for benchmarking. Assuming *arguendo* there were shown to be density-related inaccuracies in the Synthesis Model cost estimates for additional UNEs, their inclusion in any benchmark comparison would taint it as well. The Commission should reject Verizon's two-wrongs-make-a-right theory of benchmarking.

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[4] *See* CC Docket No. 96-45, *Federal-State Joint Board on Universal Service*, Recommended Decision released Dec. 22, 2000 ¶ 3 n. 9 (citing 47 U.S.C. § 153(37)).

[5] *See id*.

[6] *Id*.

[7] *See* CC Docket No. 96-45, *Federal-State Joint Board on Universal Service*, Recommended Decision released Dec. 22, 2000 ¶ 6 n. 20 (emphasis added).

[8] Verizon cannot credibly claim to be unaware that it is misquoting the Rural Task Force report. Verizon offered the same misquotations the New Hampshire/Delaware 271 case, and AT&T responded with the same quotations from the actual findings of the Task Force that AT&T submits here. *See* WC Docket No. 02-157, AT&T ex parte filing dated Sept. 5, 2002 at 3-4.

C. Verizon's Remaining Arguments Are Beside The Point.

Verizon's remaining arguments in its 25-page ex parte letter are essentially variations on the theme of evading the issue.

Verizon's Claim That Section 271 Requires UNE Prices To Satisfy The Act Only In The Aggregate. Verizon's claim that the statutory pricing standards governing Section 271 cases apply only to network elements in the aggregate, and not individually, is both irrelevant and false. Verizon ex parte at 4-6. It is irrelevant because the relative overstatement of transport costs by the Synthesis Model in low density states invalidates the benchmarking results not only for transport, an individual element, but also for any other benchmark comparison that includes Synthesis Model transport costs.[9] Relying solely on an aggregate nonloop benchmark in these circumstances thus violates the statute regardless of whether its just and reasonable rate standard is construed as apply to UNE prices individually or only in the aggregate.[10]

In any event, Verizon's attempt to reduce the statute to merely an aggregate rate constraint is untenable. Section 271 clearly requires that the Commission take reasonable steps to ensure that *every* network element is priced at just and reasonable levels individually, not merely in the aggregate. While the Commission is entitled to *implement* that standard with aggregate comparisons—if their results are reasonable proxies for the results of a UNE-specific analysis—the Commission is *not* entitled to employ evidentiary shortcuts of this kind regardless of their reliability and accuracy. AT&T Supp. Comments at 13.

Section 252(d)(1) specifies that the price of a network element must be "based on the cost . . . of providing . . . *the* network element." *Id*. (emphasis added). Verizon's claim that governing provision of the Act is Section 271, not Section 252(d)(1), is incomprehensible (Verizon ex parte at 4). Sections 271(c)(2)(B)(i) and (ii), the first and second items in the competitive checklist, *specifically incorporate Section 252(d)(1) by reference*. Specifically, the Commission is directed to determine whether Verizon provides "access to network elements *in accordance with the requirements of sections* 251(c)(3) *and 252(d)(1)*." 47 U.S.C. § 271(c)(2)(B)(ii) (emphasis added). Even Verizon quotes this provision (Oct. 16 ex parte filing at 4).

This element-specific focus is underscored by competitive checklist item five, which expressly requires Bell companies to offer "[l]ocal transport from the trunk side of a wireline local exchange carrier switch *unbundled from switching or other services*." 47

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[9] *See* AT&T Supp. Comments at 15; AT&T Sept. 20 ex parte filing in New Hampshire/Delaware 271 case (WC Docket No. 02-157).

[10] *See* AT&T Supp. Comments at 15; *accord*, New Hampshire/Delaware 271 proceeding (WC Docket No. 02-157), AT&T Sept. 20, 2002 ex parte filing.

U.S.C. § 271(c)(2)(B)(v) (emphasis added). Likewise, competitive checklist item six requires Bell companies to offer "[l]ocal switching *unbundled from transport, local loop transmission, or other services*." *Id*., § 271(c)(2)(B)(vi) (emphasis added). The right to separate provisioning of switching and transport would be pointless if incumbent LECs were free to price those elements individually at any level the LECs chose.

Judicial precedent confirms the plain meaning of the Act. "TELRIC prices are calculated on the basis of *individual* elements." *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1678 (2002) (emphasis added).[11] Hence, UNE prices must satisfy Section 251 and 252 at the level of individual elements, not just in the aggregate. *See*, *e.g.*, *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 218, 236-39 (D.Del. 2000) (separately reviewing Verizon's switching prices for compliance with Section 252(d)(1)); *id*. at 248-50 (reviewing and overturning charges applicable only to OSS access).

Even Verizon has previously acknowledged this fact. Seeking to overturn the UNE prices set by the Delaware Public Service Commission in 1997, Verizon argued that, if the Delaware PSC set unrealistically low prices for switching, that error alone "would violate the Act's requirement that the rates charged for unbundled network elements reflect 'the cost of providing' the network element. *See* 47 U.S.C. § 252(d)(1)(A)(i)." *Bell Atlantic-Delaware*, *supra*, 80 F.Supp.2d at 237 (summarizing Verizon position). The court, while ultimately rejecting Verizon's claim that the PSC had understated the cost of unbundled switching, agreed with Verizon (and AT&T) that UNE prices must satisfy Section 251 at the element-specific level. *Id*.

Verizon's Claim That The FCC Has Discretion Not To Enforce The Pricing Standards of Sections 252 and 271. Verizon's attempt to enshroud its UNE prices in a cloud of administrative discretion (Verizon ex parte at 4-6) is likewise unfounded. The degree of deference owed to state commissions on review of their UNE cost findings is an entirely separate issue from the level of disaggregation at which the review must occur. AT&T Supp. Comments at 18. Moreover, even under a highly deferential standard of review, administrative rate setting must be overturned if the agency's judgment is "irrational given the relevant evidence in the record," *American Postal Workers Union v. USPS*, 891 F.2d 304, 314 (D.C. Cir. 1989), or if the agency has failed to "examine the relevant data and articulate a rational connection between the facts found and the choice made." *Bell Atlantic-Delaware*, 80 F.Supp.2d at 227. Because of the deficiencies in the transport module of the Synthesis Model, no connection can rationally be drawn in this case between (1) the results of the aggregate non-loop benchmark comparison submitted by Verizon and (2) the ultimate issue of whether Verizon's non-loop rates comply with Sections 252 and 271

[11] *See also AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 394 (1999) ("The dictionary definition of 'unbundled' (and the only definition given, we might add) matches the FCC's interpretation of the word: 'to give separate prices for equipment and supporting services.'").

Prior Commission Decisions In Section 271 Cases. Verizon predictably invokes the Commission's prior decisions upholding the general appropriateness of aggregate non-loop benchmarking in 271 cases. Verizon ex parte at 2-3, 7-8. But whether aggregate benchmarking is appropriate as a general policy is not the issue here. The issue is whether aggregate benchmarking is appropriate in *this* case, under the particular circumstances here: (1) the aggregation of elements to be compared includes transport; (2) the comparison state has a lower line density than the anchor state; and (3) the Synthesis Model is used to develop the state-to-state cost comparisons. Because neither Verizon nor Commission precedent has offered a coherent explanation of how aggregate benchmarking can satisfy the Act in *these* circumstances—i.e., circumstances when the cost comparisons break down—precedent supporting benchmarking in *other* circumstances is irrelevant.

Verizon's Claim That The Overstatement of Transport Costs Has No Competitive Significance Because CLECs Do Not Order Switching Separately From Transport. Verizon's continued insistence that the reasonableness of its rates for unbundled switching alone is of "no competitive significance" because no "CLEC has ever ordered switching and shared transport separately in Virginia" (Verizon ex parte at 7-10) is without merit for the reasons noted above. The flaw in the transport module of the Synthesis Model—its tendency to overstate transport costs, and to overstate them more in states with lower population density—taints *any* benchmarking analysis that includes Synthesis Model estimates of transport costs. CLECs thus are aggrieved by this error regardless of whether they ever buy any unbundled switching separately from other non-loop elements.[12] Once again, Verizon responds to this point by ignoring it.

Verizon's Claim That "Rate Structure Differences" Between States Warrant Aggregate Benchmarking. Verizon's assertion that "rate structure differences between states" justify aggregate non-loop benchmarking is another red herring (Verizon ex parte at 10-11). Verizon is apparently suggesting that differences exist among states in the recovery of costs that are incurred by "other non-loop" elements (such as shared trunk ports and signaling) in common with switching usage. AT&T's "switching only" benchmark analysis, however, includes the revenues and costs of those elements as well.[13]

Verizon's Claim That "Reexamining" The Synthesis Model Is Beyond The Scope Of This Case. Verizon's claim that "reexamining" the Synthesis Model is beyond the scope of this case (Verizon ex parte at 12-14) is equally disingenuous. *Redesigning* the Synthesis Model to eliminate its tendency to overstate transport costs is certainly

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[12] *See* AT&T Supp. Comments at 15; *accord*, New Hampshire/Delaware 271 proceeding (WC Docket No. 02-157), AT&T Sept. 20, 2002 ex parte filing.

[13] WC Docket No. 02-157 (New Hampshire/Delaware 271 case), Lieberman Decl. (July 17, 2002) ¶¶ 14-15; *id*. Lieberman/Pitkin Reply Decl. (Aug. 12, 2002) ¶ 23 n. 12.

beyond the scope of a 271 proceeding. But *recognizing* that the Model suffers from error in the particular circumstances of this case, and *reconsidering* whether an aggregate non-loop benchmark should remain the conclusive test of TELRIC compliance in these circumstances, are at the core of the Commission's duties within this case.

Section 271 requires the Commission to decide whether Verizon's UNE prices in Virginia are just and reasonable—and to make that decision based on the best evidence available within the 90 day statutory life of this case, not some future proceeding. Because the Synthesis Model does not estimate relative transport costs accurately, the best available evidence of rate reasonableness in this proceeding are (1) benchmark analyses that exclude transport, and (2) direct scrutiny of the TELRIC compliance of Verizon's rates. AT&T's comments demonstrate that Verizon's switching prices flunk both tests. Ignoring these common sense alternatives, and accepting Verizon's flawed Synthesis Model-based benchmark comparisons, on the ground that the ultimate remedy of correcting the Synthesis Model algorithms is beyond the scope this case, would epitomize arbitrary and capricious decisionmaking. As the D.C. Circuit noted in an analogous context, the "best must not become the enemy of the good, as it does when the FCC delays making any determination while pursuing the perfect tariff." *MCI Telecom.* v. *FCC*, 712 F.2d 517, 535 (D.C. Cir 1983). *See also Schwabacher v. United States*, 334 U.S. 182, 193 (1948).

AT&T's Supposed Waiver Of Future Challenges To The Synthesis Model. Verizon's continued suggestion that AT&T has somehow waived any challenge to the Synthesis Model by supporting adoption of the Synthesis Model in earlier proceedings before the FCC (Verizon ex parte at 14-15) is equally wrong-headed. AT&T is unaware of any doctrine of administrative estoppel that bars participants in the Commission's processes from modifying their positions in response to new data and analyses. Major cost models evolve over time.[14] The development of the Synthesis Model has been a collaborative process, in which multiple rounds of scrutiny have yielded repeated improvements over time as the Commission and interested parties have identified errors. Verizon certainly cites no Commission precedent recognizing such a doctrine, which would effectively lock the parties' positions in place in the early stages of the development process.[15]

AT&T began raising the transport cost issue as soon as its experts uncovered the problem. AT&T has raised the issue vigorously since then—not only in multiple 271 cases, but also in the pending pricing case before this Commission in the Verizon-

[14] Verizon has not hesitated to emphasize this fact in other contexts. *See* Verizon Sept. 26 ex parte letter at 3 (asserting that the "body of case law, state decisions, and FCC explication of TELRIC principles" have advanced considerably since 1997).

[15] Just as the Commission is entitled to modify their positions in response to new evidence, so are litigants.

Virginia arbitration proceeding. In the context of the latter case, Verizon's attempt to estop AT&T from raising the issue rings especially hollow.

Verizon's transport costs, according to its own studies in the Virginia arbitration, are only about *one-third* the corresponding estimates generated by the Synthesis Model. *See* AT&T Supp. Comments at 17 & n.23. Provoked by this anomaly, a member of the Commission's staff asked AT&T's transport witness, Steve Turner, "why don't you just all agree that we should use [Verizon's transport cost estimates] and we could all go home?"[16] Mr. Turner replied that, if forced to choose between the Synthesis Model and Verizon models for transport costs without modifying either one, he would choose the latter.[17]

Verizon, for its part, agreed that the "MSM's Switching and Transport Module" (Verizon's term for AT&T's runs of the transport module of the Synthesis Model) was "inappropriate for use in a UNE proceeding."[18] The model was "flawed," Verizon added, "as AT&T/WorldCom admitted."[19]

Verizon's criticisms of the Synthesis Model went much further, however. Verizon assailed the Model as "incapable of estimating company- and state-specific UNE rates with any accuracy."[20] The Model, Verizon added, "is not designed to model, nor can it be modified to account for, the costs of the full and robust network that is the focus of UNE proceedings."[21] The "underlying platform" of the Model "prevents it from accurately measuring the forward-looking costs that Verizon VA or, for that matter, any efficient carrier, would incur in providing the full range of UNEs required by the Commission."[22] Verizon has never retracted these criticisms.

By contrast, Verizon adamantly defended the accuracy of its own transport cost estimates in the Virginia arbitration—i.e., estimates at one-third the level of the estimates generated by the Synthesis Model: "Verizon VA's methodology for calculating the costs of the interoffice transport (IOF) and entrance facilities UNEs assumes the use of a forward-looking, cost-minimizing SONET network configuration that is capable of

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[16] *Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc., & AT&T Communications*, CC Docket Nos. 00-218 and 00-251, 19 Tr. 5552 (Nov. 29, 2001) (Mr. Morris).

[17] *Id*. at 5553 (Mr. Turner).

[18] *Id*., Verizon Initial Post-Trial Brief on Cost Issues (Dec. 21, 2001) at 173.

[19] *Id*.

[20] *Id.*, Verizon Reply Post-Trial Brief on Cost Issues (Jan. 31, 2002) at 133.

[21] *Id*.

[22] *Id*. at 134.

serving Virginia demand . . . and reflects reasonable assumptions about IOF in a forward-looking network."[23] Verizon cannot have it both ways. It cannot simultaneously claim in the arbitration that its own transport cost estimates are the best evidence of its forward-looking transport costs, while deriding AT&T for arguing against accepting the threefold higher values produced by the Synthesis Model at face value here.

The Administrative Feasibility Of Considering Switching-Only Benchmark Evidence. Verizon's contention that the relief proposed by AT&T here would impose an unmanageable fact-finding burden on the Commission (Verizon ex parte at 19-20) is another attack on a straw man. AT&T has repeatedly made clear in prior Verizon Section 271 cases that AT&T does not propose a general prohibition on the use of benchmarking tests in all or most 271 cases. Where an intervenor makes a particularized showing that the test does not work properly in a particular case, it is not an unreasonable burden on the Commission to ask it to consider the supplemental or alternative evidence that the intervenor has undertaken the burden of producing. As long as the Commission limits its consideration to the combinations of UNEs actually analyzed by the parties, the Commission's task should remain within manageable bounds.[24]

Unfairness and Surprise. Verizon's claim that considering AT&T's supplemental evidence on the reasonableness of Verizon's switching rates would be an unfair "change" in the Commission's "established benchmarking test in the middle of this application" (Verizon ex parte at 20-22) is truly ironic. The Commission's benchmark standards are not the product of notice-and-comment rulemaking; they evolved in Commission adjudications of particular 271 applications and can be modified in the same way.

The Commission's evolution of benchmarking is a perfect illustration. In its Kansas/Oklahoma 271 decision, the Commission benchmarked only one element, loops; for the other elements, the Commission purported to look directly at evidence of their reasonableness.[25] In its Massachusetts 271 decision, the Commission relied on a

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[23] *Id*. at 116.

[24] The Surface Transportation Board (formerly the Interstate Commerce Commission) has adopted this burden-limiting procedural device in analogous circumstances in railroad rate cases. *See Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520, 534-44 (1985), *aff'd*, *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987) (limiting stand-alone cost analysis of railroad freight shipments in a rate case to the groupings of shippers and rail lines analyzed by the ratepayers); *Bituminous Coal—Hiawatha, Utah, to Moapa, Nevada*, 1987 WL 98994 (served July 23, 1987) at 2 (in rate cases, freight shippers have the right "to define the grouping of shippers and the rail lines which, in the shipper's view, will create the lowest cost transportation system"); *id*., 1998 ICC LEXIS 364 (Nov. 30, 1988) (same); *id*., 6 I.C.C.2d 1, 48-49 (1989).

[25] Kansas/Oklahoma 271 Order ¶¶ 82-95.

switching-only benchmark.[26] In the Rhode Island 271 case, the Commission announced that non-loop benchmark comparisons could rely on company-specific MOU data for switching usage, rather than standard MOU data.[27] There is no reason why this case-by-case evolution must cease now.

Moreover, any delay in the airing of the switch-only benchmarking issue in this case is of Verizon's own making. It is Verizon that chose to wait until the 64th day of this case to file the reduced switching rates that are now at issue. Verizon's original application did not require the Commission to resolve the appropriateness of switching-only benchmarking because Verizon's rates at that time indisputably flunked the aggregate non-loop test as well. Had Verizon complied with the Commission's "complete as filed" rule by filing its newly reduced rates before filing its 271 application, the issue could have been aired fully at a much earlier stage in this case. Verizon's boilerplate case citations regarding the "elementary fairness" of giving applicants "sufficient notice" of the claims that they are expected to answer (Verizon ex parte at 21) apply with equal logic to AT&T and the other intervenors. After making a mockery of the "complete as filed" rule by waiting until day 64 of this case to file the rate reductions that elevated switch-only benchmarking to an issue of importance, Verizon can hardly complain that AT&T did not fully join the issue until shortly thereafter.

Very truly yours,

David M. Levy

An Attorney for AT&T Corp.

[26] Massachusetts 271 Order ¶¶ 23-34.

[27] Rhode Island 271 Order ¶ 55 n. 149.